Supreme Court, U.S.
FILED
NOV 22
CLERK

(3)

No. 95-393

In the Supreme Court of the United States

October Term, 1995

DAVID HELLER,
Petitioner,

v.

SYLVIA SMITH BOWMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER IN REPLY

ALAN M. DERSHOWITZ
MICHAEL R. SCHNEIDER
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617
Counsel of Record
Attorneys for Petitioner

November 22, 1995

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

DAVID HELLER,
Petitioner
v.

SYLVIA SMITH BOWMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER IN REPLY

Petitioner David Heller respectfully submits this brief in reply to the brief for the respondent in opposition.

In an effort to avoid a grant of certiorari on a constitutional issue that is

plainly of great nationwide significance, the respondent, in her brief in opposition, distorts the record below.

The respondent asserts that Mr. Heller's photocollages were a purely private matter which "had nothing to do with the election" and that there was thus no "nexus between the photocopies and respondent's public figure status" (Brief for Respondent in Opposition, pp. 7, 8). The fact is that the photocollages were produced by Heller, an active campaign worker for Bowman's political opponent, using Bowman's own campaign postcards, and were distributed by him in the midst of a hotly-contested union election campaign.

The respondent quotes out of context

Heller's statement that he did not intend to "have an effect on the overall election" (Brief for the Respondent in Opposition, p. 8). The fact is that Heller made clear that it was his intent to "poke fun at [Bowman's] campaign, just to make a political satire" and that he wanted the photocollages "reflect[ ] the absurdity of some of her views and statements" as a candidate (R. 1074) (emphasis added).

The respondent further asserts that "[f]or several years prior to the incident which gave rise to this litigation, Heller was antagonistic toward Bowman" (Brief for the Respondent in Opposition, p. 2). The fact is that the antagonism between the two was

entirely political -- generated by Bowman's political attacks on Heller, including her statement that she "hate[d] his politics" and her accusation that Heller and his candidate were "communists" (R. 976, 978-979). Heller never criticized her as an employee -- only as a candidate for union office.

While it is true that the distribution of the photocollages was limited to those already favorably disposed to Heller's candidate, it is equally true that election speech is not to be protected only when it is addressed to one's political adversaries or to independents amongst the electorate. Much political expression has historically been addressed to those in one's own camp in order

to rally the troops or to shore up support.

To define "nexus" the way the respondent does is to exclude much that has traditionally fallen within the protections of the First Amendment -- including personal criticism of candidates and satirical attacks on their views which, for better or worse, have become a staple of modern political campaigns in this country.

The respondent concedes that the court below "did not rely upon the lack of nexus between the photocopies and respondent's public figure status" (Brief for the Respondent in Reply, p. 7). In fact, the court below relied upon an argument abandoned by the respondent, namely, that "the

particular union election at issue was not a public controversy sufficient to give Bowman public figure status" (Brief for Respondent in Opposition, p. 5). Respondent abandons this argument for good reason, since it is absolutely clear that a union election campaign for the presidency of a statewide 8,700-member public employees union is the very paradigm of a "public controversy." The respondent is thus compelled to rely on the argument that there is no "nexus" between Heller's satirical photocollages and Bowman's political campaign -- an argument inconsistent with the record.

CONCLUSION

The court below ruled that union elections are no more "public controvers[ies]" than elections for social clubs or condo associations, and that a prominent union political activist running for president of a statewide 8,700-member union was not a limited purpose public figure, despite the election context in which the expression of opinion was published. This ruling has profoundly disturbing implications for the free speech rights of American citizens in union elections and in the workplace. Accordingly, this Court should grant Heller's petition for certiorari.

Respectfully submitted,

Alan M. Dershowitz
Michael R. Schneider
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617
Counsel of Record

Dennis J. Kelly
Burns & Levinson
125 Summer Street
Boston, MA 02110-1624
Of Counsel
Dated: November 22, 1995